STATE OF NEW YORK
COUNTY OF NIAGARA

NIAGARA COUNTY COURT

PEOPLE OF THE STATE OF NEW YORK,

MOTION TO SUPPRESS

-vs-

INDICTMENT NO. 2008-306

RYAN S. SMITH,
Defendant

DECISION and ORDER

SPERRAZZA, J.

The defendant has moved to suppress the results of the testing done of his DNA and the comparison with that DNA to a sample recovered from the alleged crime scene. The People have responded in opposition and a fact finding hearing was held before the Court which commenced on May 11, 2009. The Court has reviewed the evidence presented at the hearing and the parties' Memoranda of Law in support of their positions. After due consideration of the law and the facts, the Court makes the following ruling on the motion.

The People submitted to the Court an Order to Show Cause (OSC) on August 5, 2008. That application directed the defendant to show cause why he should not be compelled to submit to a buccal swab for his DNA. The OCS was filed with an affidavit signed by ADA Doreen Hoffman.

In that affidavit, ADA Hoffman stated that in July 2006, four black males had entered a residence in the City of Niagara Falls, tied up two children who resided there and compelled their mother to go with them to another address. At that location, the men shot one Joseph Harris in a robbery attempt. When the mother was taken from the residence, one of the intruders remained behind with the children. This intruder had taken a can of pop from the refrigerator and the police later extracted DNA from the can. No immediate results were obtained from the ensuing investigation of the crime. Eventually, the DNA profile from this can was matched by a CODIS hit with the DNA of the defendant. The sample from the defendant was obtained after he had been convicted of Assault 3rd Degree earlier in 2008.

On December 24, 2006, a glove was recovered during a police investigation following an armed robbery of a store. It appeared that the glove may have been dropped by one of the

robbers. Two DNA profiles were extracted from the glove, one of which matched the profile of DNA extracted from the pop can. The People's affidavit asserted that there was probable cause to believe that the defendant was involved in both crimes and that a DNA swab was necessary to either include or exclude him as a suspect.

Police reports of the kidnapping case appended to the application substantiated that Mr. Harris had been shot and that the children had been found, one still duct-taped and the other hiding on the roof of the house. Cans of pop were recovered by the police at the residence. The intruders were said to have had covered faces and wore rubber gloves. The police report connected with the December robbery indicated that a glove found on top of a fence at the rear of the store had been secured. Laboratory reports from the Erie County Forensic Laboratory indicated a connection between the DNA on the glove and the pop can, and a report from the State Police Laboratory indicated a match between the DNA from the can and that of the defendant, Ryan S. Smith.

The Court signed the OSC and set a return date of August 19, 2008. The defendant did not appear in Court on that date. On August 21, 2008, ADA Hoffman sent a letter to the Court in which she stated that the defendant had not appeared and that an affidavit from Det. James Galie, indicating service of the OSC upon the defendant, was attached. ADA Hoffman requested that the Court sign an Order compelling the defendant to submit to a DNA swab to be taken by or at the direction of the Niagara Falls Police Department. The Court signed the Order (First Order) on August 22, 2008. That Order and accompanying paperwork was then delivered to the People for execution.

ADA Hoffman sent a letter to the Court on September 24, 2008. The People requested that the Court issue another Order compelling the defendant to submit to a DNA swab, due to the fact that the swab taken pursuant to the First Order had been sent to the wrong laboratory and thereby compromised. The People sought a Second Order so that a swab could be obtained to submit to the correct laboratory. The Court signed the Second Order on September 25, 2008.

The defendant was subsequently indicted and charged with several counts of Burglary 1st Degree, Robbery 1st Degree and Kidnapping 2nd Degree for the first incident, as well as Robbery 1st Degree and other crimes for the second incident. The minutes of the Grand Jury presentation show that the People presented evidence from the analysis of the swab taken pursuant to the Second Order to connect the defendant with each of the criminal incidents.

The defendant has moved to suppress the results of the DNA analysis and to dismiss the indictment. The defendant claims that the DNA swab was obtained in violation of his constitutional rights.

The defendant filed an Affirmation in support of the Motion, then an Amended Affirmation. In the Amended Affirmation, the defendant's attorney stated that the defendant was refused release from custody at the end of his sentence for Assault 3rd Degree unless he provided a buccal sample to jail personnel for testing, and further that the sample taken at the jail, which was ultimately submitted to CODIS, was taken without a court order or a warrant. The defendant claimed that this was in violation of his constitutional rights.

At the hearing on the motion, the defendant acknowledged that the DNA sample was properly taken from him at the jail and the Court finds that it was, in fact, properly taken and entered into the CODIS system, pursuant to Executive Law § 995.

Defense counsel further claimed in his motion that with regard to the sample taken pursuant to the Second Order, the police approached the defendant on the street and asked him to voluntarily give a buccal swab, which he refused. Then, without any warrant or court order, they seized him and took him to police headquarters. There, the defendant asked to see any court order directing the taking of a swab, which the police refused to show to him. After consulting with an Assistant District Attorney, the police used a Taser on the defendant, rendering him unconscious, so that the swab could be taken.

In their Response, the People refer to the actions that led up to the signing of the Second Order. The People state that in order to execute the Second Order, the defendant was located on the street and was brought to police headquarters. There, the officers showed the defendant a copy of the Second Order and the defendant refused to voluntarily allow a swab to be taken, stating that he would have to "be tased" to get it. The police, after speaking to an ADA, then utilized a Taser in "drive stun" mode, and obtained a buccal swab (During the hearing the mode was referred to as "drive stun" and as "dry stun". The Court will use the term "drive stun"). The defendant was left with no ill effects. The People contend that the use of the "drive stun" was a reasonable use of force to effect the lawful court order.

At the hearing held before the Court, the defendant conceded, as noted above, that the swab taken at the jail was lawfully obtained. However, the defendant still contended that he

never received notice of the first OSC. The defendant notes that the People's letter of August 21, 2008, which informed the Court that the defendant had not appeared on the return date set in the OSC, stated that there was attached an affidavit of Det. James Galie indicating service of the OSC upon the defendant. This affidavit cannot be located, either by the People, the Court or the police. The defendant argues that he was not served, there never was an affidavit, and that the People falsely claimed service upon the defendant of the OCS.

The Court would take notice of several facts concerning the issuance of the First Order. Upon signing the OSC and setting the return date, the Court's next awareness of this investigation came through the People's letter of August 21, 2008. The Court reviewed that letter, verified our own records to affirm that the defendant had not appeared, and signed the First Order. That Order and its accompanying paperwork was then given to the District Attorney and the Court did not retain a copy of those documents (The best procedure would have been for the District Attorney to file the Order with the County Clerk and to have returned a copy, marked "Original Filed", to the Court). However, the Court has concluded that the defendant was properly served with the OSC, for the following reasons.

First, Det. James Galie testified, under oath, that he had in fact served the OSC upon the defendant at police headquarters on August 7, 2008. The defendant was in the building in connection with an unrelated Niagara Falls City Court proceeding and Galie stated that he stuck the papers in the defendant's shirt when the defendant refused to accept service. The Court would note that the defendant did not take the stand at the hearing to deny this testimony or to deny service of the OSC. Therefore, the only testimony before the Court is that of Det. Galie, which the Court finds to be credible. Further, Galie testified that he signed a document recording his service of the OSC, although he did not keep a copy.

Entered into evidence at the hearing was a police report authored by Det. Patricia McCune on August 7, 2008. This report confirms the service upon the defendant by Det. Galie, as witnessed by Det. McCune. A copy of this report had been given to the Court, prior to the hearing, in response to a request for any documents in the possession of the People relating to the Orders issued by the Court.

The Court does not have a recollection of the actual paperwork presented in connection with the People's application, but would not have signed the First Order upon the representation

of the People contained in the August 21, 2008 letter without confirming that there was indeed documentation of proof of service, as stated in the letter. The Court is convinced that there was either an affidavit signed by Galie, which has become lost, or the Court was presented with a copy of the report of Det. McCune, which the Court would have accepted as sufficient proof of service upon the defendant. In either event, combined with the unrefuted testimony of Det. Galie, there is conclusive proof that the defendant was served with the OSC.

The Court must next determine whether the First Order was properly granted. The law has said that in a pre-charge situation, the People may apply for an order to obtain a blood sample of a suspect (*Matter of Abe A.*, 56 N.Y.2d 288). This order is in the nature of a search warrant and must be supported by (1) probable cause to believe the suspect has committed the crime, (2) a "clear indication" that relevant material evidence will be found, and (3) the method used to secure it is safe and reliable. In addition, the issuing court must weigh the seriousness of the crime, the importance of the evidence to the investigation and the unavailability of less intrusive means of obtaining it, on the one hand, against concern for the suspect's constitutional right to be free from bodily intrusion on the other. Only if this stringent standard is met may the intrusion be sustained (*Matter of Abe A.*, supra, at 292). As the application seeks an intrusion in the suspect's body, it may not be *ex parte* but must be upon notice and give the suspect an opportunity to oppose the request. The authority of Matter of Abe A. has been applied to applications for buccal swabs for DNA testing (see, *People v. Afrika,* 13 A.D.3d 1218, 4th Dept 2004; *Marino v. Kahn*, 49 A.D.3d 741, 2nd Dept 2008).

This standard complies with the Federal Constitution and law as set out in *Schmerber v. California*, 384 U.S. 757, 772 (1966), wherein the Court noted that "The integrity of an individual's person is a cherished value of our society". That case dealt with the police desire to obtain a blood sample and the Court held that a determination of whether a particular bodily intrusion is permissible under the Fourth Amendment requires (1) application of the ordinary Fourth Amendment requirements of a warrant based on probable cause, or an exception to the warrant requirement such as exigent circumstances, and (2) the manner in which the particular intrusive procedure is to be performed must be reasonable (*Schmerber*, supra, at 770-72). As the Court of Appeals noted in *People v Hall*, 10 N.Y.3d 303 [2008], a "bodily intrusion" case, "Nevertheless, it is clear that reasonableness is the "ultimate touchstone of the Fourth Amendment".

The Federal Courts have also noted that a DNA sample may be taken in compliance with the Federal Constitution, without a court order, upon a showing of particularized reasonable suspicion, noting that the taking of buccal swabs does not involve any penetration of the skin, as does the drawing of a blood sample, nor does it force the suspect to perform in front of a law enforcement official a task normally performed in private, such as the taking of a urine sample. As such, the buccal swab procedure is only slightly invasive, and is more comparable to fingerprinting (see *United States v. Owens*, 2006 WL 3725547, Western District of New York, 2006).

The Court finds that the People provided sufficient information to establish probable cause to believe that the defendant had committed the crimes charged. Further, this Court finds that substantial evidence was provided by the People that gave a clear indication that the oral swab sample would supply relevant material evidence. The Court weighed the seriousness of the crimes and the potential importance of the evidence to the investigation and the unavailability of a less intrusive means, against the defendant's right to be free of bodily intrusion. The defendant has not raised any issue of fact supported by sworn affidavit, or by evidence adduced at the hearing, sufficient to challenge either the People's prima facie showing of probable cause to believe that this suspect has committed the crimes alleged or the relevance of the DNA evidence. The Court concludes that the substantial factual predicates set forth in the People's application outweigh the defendant's constitutional right to be free of bodily intrusion, especially when such intrusion is as minimal as an oral swab sample. Therefore, the Court finds that the First Order was lawfully issued.

The next question before the Court is whether it was lawful to issue the Second Order upon the People's *ex parte* application. The People sent a letter to the Court, dated September 23, 2008, which indicated that the defendant had submitted to the First Order and given a buccal swab, but that the swab had been sent to the wrong laboratory. There was not enough material left to have the appropriate laboratory test the swab and a second swab would be necessary to accomplish the testing sought by the People. The People submitted a proposed Second Order.

The Court found the application by the People to be sufficient to support the request. The ADA's letter explained the circumstances which made a second swab necessary. The Court did not find that this second request had to be upon notice for several reasons. First, the defendant

had been put on notice of the first request and had failed to appear, did not raise any reasons why the buccal swab should not be taken and thereby waived any objection to the granting of the Order. Second, it was apparent from the ADA's letter that the defendant had submitted to the First Order. To the Court's knowledge, he consented to the first swabbing. Third, the relevant issue was whether a bodily intrusion was authorized by a probable cause showing, as required by *Matter of Abe A.*, and the Court had already found that there was good cause for such an intrusion. Those facts had not changed and the People had made a sufficient showing that they were entitled to test the Defendant's DNA to determine if he was involved in these very serious crimes. The only objection the defendant could raise at this point would be to the inconvenience of a second swab. He has not, to this day, contended that there was insufficient probable cause, based upon the facts alleged by the People, to support the request. The Court was aware that a buccal swab of the inside of a person's mouth takes only seconds, is not at all painful and carries no risk of infection. Under those circumstance, and weighing the necessity shown by the People, mere inconvenience would not be sufficient to defeat the People's request. Therefore, the Court finds that the Second Order was properly issued.

The next issue to be considered is the manner in which the Second Order was executed by the police.

Det. James Galie and Det. Frank Coney testified that they were aware of the Second Order and located the defendant at the corner of 7th Street and Niagara on September 29, 2008 at, or shortly before, 6:00 p.m.. They told the defendant that he had to come with them and he was placed in a patrol car by Officer George McDonnell, without objection or resistance. Det. Galie testified that he may have mentioned the DNA Order at the scene but the Court is not clear whether it was mentioned or whether the defendant was just told to accompany the officers.

At police headquarters, the defendant was taken to the fingerprinting room. Present were Det. Lt. William Thomson, Det. Frank Coney, Det. James Galie, Officers McDonnell and Sykes, all of whom testified at the hearing, and Officer Warme, who did not testify. The Court found the testimony of these witnesses to be consistent and credible.

The Court finds from the testimony of these witnesses that the defendant was informed of the nature of the Second Order and what it required and was given the opportunity to review a copy of that Order. The police took some time in asking, and attempting to convince, the

defendant to submit to the swab. The defendant raised no objection to the swab on the grounds of offensiveness of the procedure, embarrassment, or fear of pain or infection. The defendant merely firmly and obstinately objected to submitting to the authority of the Order. He said that he had already given a sample and that they would have to "tase" him to get another swab.

Det. Lt. Thomson, the ranking officer present, consulted by telephone with ADA Hoffman who instructed him that they could use the minimum force necessary to obtain the sample. Thomson then instructed the officers that they were allowed to use force but to use the minimum force necessary. The officers considered alternative methods of obtaining the sample, such as holding the defendant down and forcing open his mouth. They concluded that such a use of physical force would most likely cause substantial pain to the defendant and possibly lasting physical injuries. They also concluded that such actions would place themselves at risk of physical injury, as they had knowledge of the violent history of the defendant. They made the judgment that the use of the "drive stun" by Taser was the least intrusive and offensive, and the safest method, of getting the defendant to comply with the court ordered swab.

Some of the proceedings were recorded on the Taser internal computer, which created a digital record of its use as well as an audio-video recording from the instrument itself when it was turned on. Det. Angela Munn testified at the hearing regarding the particular Taser used and the data and audio / video record which she downloaded from the internal computer.

In the video, the defendant is handcuffed, his shirt is pulled up to bare his shoulders and he is seated on the floor. The police can be heard informing the defendant that the Taser would be painful and unpleasant, yet the defendant persisted in his refusal. The officers told the defendant that they did not want to hurt him and that they just wanted to get the swab and let him leave. The defendant was adamant in his refusal. Prior to using the Taser, the officers had seated the defendant on the floor so that he would not be hurt by falling.

The police took steps to minimize the pain inflicted, by utilizing the “drive stun” mode and avoiding a more sensitive part of his body. Evidence presented to the Court indicated that the normal method of using the device is to shoot two prongs which are connected by wires to the Taser. The prongs attach to the subject's body and the electric charge applied thereby travels through the body from prong to prong, which overrides the central nervous system and results in total physical incapacitation of the body. In "drive stun" mode, the prongs are not used and the

Taser is touched to a point on the body, resulting in a localized charge which causes the muscles in that area to spasm and constrict while the charge is being applied. The "drive stun" mode is less painful and less debilitating. The use of the Taser in this mode does cause pain, which ceases instantly upon stopping the device. After a final entreaty and warning, Officer McDonnell, who had been trained in the use of the device, applied the Taser to the defendant's shoulder area. He testified that a charge was applied for one and one-half to two seconds to the defendant's shoulder, at which time the defendant pulled away and cried out. The data record from the device itself reflected that the charge was activated one time for four seconds. The video recording indicates that the defendant did yell out as if in pain and then agreed to comply with the Order. The video becomes filled with static during the use of the Taser and it cannot be determined from the video whether or not the defendant ever lost consciousness, although he speaks immediately after the device was used. The officers testified that he remained conscious, did not appear to have suffered any injury whatsoever, and refused their offer of medical attention. They did not observe any mark(s) from device on his shoulder. Two swabs of the inside of his mouth were taken by Officer Sykes.

The defendant was then placed under arrest on charges of Obstructing Governmental Administration for his refusal to submit to the court Order.

We are now called upon to determine the extremely sensitive issue of whether a suspect in Kidnapping and Armed Robbery cases can be "tased" to illicit compliance with a Court Order for a DNA swab. We begin with the premise that an Order of the Court must be obeyed. The Court believes that the best step to take upon a defendant's refusal to submit to a court Order would be to bring the defendant, in custody, before the Court so that the Court could attempt to convince the defendant to submit and warn the defendant of the penalties for his refusal, which would include criminal charges and incarceration for Contempt and Obstruction. The Court would explain § 690.50 CPL and its ramifications, including the authority to use reasonable force to effect compliance. The defendant would be made aware that at some point he would have to comply with the Court Order. The Court would recommend that the government utilize this procedure in any similar future event.

However, the Court must determine whether the fact that the police did not bring the defendant before the Court, and the subsequent use of force in this case, requires the suppression of the evidence obtained, as suppression is the penalty only if a statute was not complied with or there has been a constitutional violation.

There is no particular statutory authority for the taking of a DNA sample from a suspect before charges have been filed. Note that subsequent to the filing of charges, such a request may be made pursuant to the discovery provision of § 240.40-2 CPL. However, case law fills the void by granting such authority in the nature of a search warrant (*Matter of Abe A.*, supra). "Nomenclature notwithstanding, if the application and the relief comport with all the requisites of a search warrant, it may be taken for what it is "(*District Attorney of Erie County v. Corlett*, 140 Misc.2d 162, citing *People v. Marshall*, 69 Mich App 288, at p 300 ; cf. *Schmerber v California*, 384 US 757, 770).

A search warrant may be issued for the search of a person (§ 690.05 CPL). In such a circumstance, the Criminal Procedure Law requires that the police officer give, or make a reasonable effort to give, notice of his purpose and authority and show a copy of the warrant upon request (§ 690.50-3 CPL). The Court finds that the police did fulfill these requirements.

The statute further states that :" *if such person, or another, thereafter resists or refuses to permit the search, the officer may use as much physical force, other than deadly physical force, as is necessary to execute the warrant.*" Therefore, it can be seen that § 690.50 CPL does not require the police to give up on the execution of the warrant, or to bring the defendant before the issuing magistrate, upon the defendant's refusal to comply with the warrant for a search of his person. The use of force is permitted by the statute. Under the statute, the question is whether the use of force was reasonably necessary.

The United States Supreme Court has said that the proper standard to judge whether the police used excessive force in the course of a Fourth Amendment seizure is whether the officer's actions are "objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation," and without 20/20 hindsight. (*Graham v. Connor*, 490 U.S. 386, 396, 397; 109 S. Ct. 1865; 104 L. Ed. 2d 443, 455, 456 (1989)). All claims that law enforcement officers used excessive force in the course of a search are analyzed under the Fourth Amendment "reasonableness standard." (*Diaz v. City of New York*, 2006 WL

3833164 (E.D.N.Y.). The standard of "objected reasonableness" has been adopted in our State (see, *Mazzariello v. Town of Cheektowaga*, 305 A.D.2d 1118, 4th Dept 2003). Therefore, the use of force, per se, is not constitutionally prohibited, as long as it is reasonable force under the attendant circumstances.

Here, the situation involved the investigation of serious crimes and the evidence sought was clearly relevant and probative to the investigation. The police had obtained a court Order for the swab and presented the Order to the defendant. The Court has considered that there was no exigency, as the People were not under any time constraints and the defendant's DNA was not evanescent. However, the defendant appeared to be adamant in his refusal.

The police sought and obtained the legal opinion of the District Attorney's Office that the use of force would be permissible, although the ADA contacted was unaware that the police were contemplating using a Taser. They continued to try to convince the defendant to submit and warned him of the consequences of the application of the device. They chose the least aggressive mode of use of the Taser and applied it for a minimal period of time. They took steps to insure that the defendant would not be injured and offered medical assistance after it was over.

The Court has not found any State cases on point regarding the use of force in the execution of an Order for a DNA sample from the person. Several cases in other jurisdictions have allowed the reasonable use of force in taking a blood sample (see *State v. Clary*, 196 Ariz. 610, Ariz.App. Div. 1, (2000), "Several officers then restrained defendant on the floor so that a phlebotomist could draw blood"; *U.S. v. Bullock,* 71 F.3d 171, where a robbery suspect was arrested and detained while police obtained a search warrant for blood and hair samples. The defendant resisted the seizures. After seven officers subdued him, he was "cuffed and shackled" between two cots strapped together and had a towel applied to his face because he was not only kicking and hitting but spitting and attempting to bite.; *State v. Lanier*, 452 N.W.2d 144 (S.D.1990), suppression was not required on grounds that excessive force was employed in taking sample, even though five or six officers restrained defendant during procedure; *State v. Worthington*, 138 Idaho 470, 65 P.3d 211, Idaho App., 2002, "In response to her request, three officers and two nurses held Worthington while the lab technician extracted the blood". In the matter of *In re Grand Jury Subpoena*, 819 F.2d 1139, C.A.4 (S.C.),1987, the appellate court

upheld the lower court's order, in the context of a grand jury investigation, authorizing the reasonable use of force to obtain a blood sample from a suspect.

Several cases have authorized the reasonable use of force to obtain a DNA sample from a prisoner. The Federal District Court in *U. S. v. Owens*, supra, 2006 WL 3725547, Western District of New York, 2006, did note several instances where reasonable force was lawfully applied to obtain a DNA sample, citing *Williams v. Berge*, 2001 WL 34377346, (W.D.Wis. Sept. 6, 2001), which held that a prison inmate's Fourth Amendment rights were not violated when a "full force tactic team" of correctional officers used unspecified force to make inmate give DNA sample and then place inmate in a cell wearing only underwear and socks; and *Sanders v. Coman*, 864 F.Supp. 496, 498-501 (E.D.N.C.1994), holding that corrections officers' use of force to obtain DNA sample, including "instances of several officers surrounding an inmate while one held his arm still, the spraying of mace, and bending inmates' wrists in a painful manner to induce compliance" did not violate Fourth Amendment or due process.

Therefore, the Court concludes that the reasonable use of force to obtain a lawfully mandated or ordered DNA sample is constitutionally permissible even though the force may necessarily involve the infliction of some pain upon the subject.

The defendant argues that the use of a Taser is *per se* unreasonable because of the excessive amount of pain it causes and the danger of serious physical harm it creates. However, while counsel has mentioned numerous times that the device inflicts 50,000 volts, the Court must admit that it does not have the scientific knowledge necessary to interpret that fact. It sounds like a high number but what is its relevance to the force imposed and pain inflicted? There was absolutely no evidence presented to the Court that this is a dangerous amount of voltage and the defendant has presented no evidence of the actual effect or dangers of this device. (For example, in *Neal-Lomax v. Las Vegas Metropolitan Police Dept.*,574 F.Supp.2d 1170, D.Nev.,2008, the evidence before that court was that "The Taser delivers short electrical pulses lasting 100 microseconds, delivering 19 pulses per second for the first two seconds, and then dropping to 15 pulses per second while discharging. Each operation of the Taser delivers approximately 50,000 volts, 26 watts, and 0.162 amps of electrical energy. Although the Taser is capable of producing 50,000 peak arcing volts, the 50,000 volts do not enter a person's body upon application of the Taser device. Rather, 1,200 peak volts, 400 volts average enter the person's body over the

duration of the Taser pulse." id. at 1176). The Court is noting this as an example of the kind of evidence or facts that were not made a part of the record in this case.

The defendant did not testify and presented no evidence of the level of pain imposed or of any injury suffered. Defense counsel claimed that the defendant was scarred but presented no evidence during the hearing to support this claim. The only evidence before the Court is what can be observed in the video recording and the testimony of the officers, some of whom stated that they had been "tased" as part of their training. Det. Galie testified that he had been "dry stunned" before this incident, that it had hurt, but that the pain ceased immediately when the charge was stopped and that there were absolutely no lingering effects. Therefore, the Court is unable to find, on the evidence presented at this hearing, that the Taser is unreasonably dangerous or painful, of itself, or as applied in this case.

The Court has found few cases in New York State courts dealing with the police use of a Taser or electronic stun gun and none dealing with the use of such an instrument to induce compliance with a warrant or order. Several Federal cases have found the device to not be excessive force, in circumstances where a subject was resisting arrest (see, *Hardy v. Plante* Slip Copy, 2009 WL 249787, *N.D.N.Y.,2009; Cyrus v. Town of Mukwonago,* Slip Copy, 2009 WL 1110413, 2009, in which the court said " The Court will view the use of a Taser as an intermediate or medium, though not insignificant, quantum of force that causes temporary pain and immobilization; *Beaver v. City of Federal Way*, 507 F.Supp.2d 1137, 1142-43 (W.D.Wash.2007), aff'd, 301 Fed. Appx. 704 (9th Cir.2008), "The Taser is considered to inflict considerably less pain than other forms of force, and the effects of the Taser are generally temporary").

The defendant argues that this is a different situation in the sense that the police were not using the Taser to overcome the defendant's active or physical resistance, such as occurs when a defendant is resisting arrest, or when an officer holds someone down so that blood may be drawn or a search of his person may be conducted. The defendant argues that the purpose here was to inflict an excessive level of pain upon the defendant, to convince him to accede to the Order. The defendant argues that this is in the nature of torture and cannot be condoned. The Court would certainly agree that the intentional infliction of pain would be unconstitutional if done maliciously or as a punishment, or if done to an unnecessary extent. Indeed, in several cases the

use of the Taser was found to be excessive, generally in circumstances where it was utilized maliciously or excessively (see *Vasquez v. Gempeler*, Slip Copy, 2008 WL 2953566 (W.D.Wis.) "maliciously and sadistically for the very purpose of causing harm"; *Hickey v. Reeder*, 12 F.3d 754, C.A.8 (Ark.),1993, the use of a stun gun on a prisoner to make him sweep his cell was excessive as the purpose was the intentional infliction of pain as a punishment and to set an example).

However, the Court does not find that the infliction of pain in a reasonable manner, to induce compliance, is necessarily unconstitutional. The Court has not found any State cases on this point but notes that in *People v. Cooper*, 7 Misc.3d 61, it was proper for an officer to squeeze a defendant's cheeks, which must have caused him some pain, to force him to expel swallowed drugs. In *Wilson v. State*, 199 P.3d 517, Wy. 2009, the situation before the court was that the police had used a Taser to get the defendant to open his hand for a search. The court there noted that there was no testimony regarding any dangers attendant from the use of a Taser or that such use would have unacceptably increased the risk to someone in that situation. The court held that the use of a Taser to open appellant's hand, under those circumstances, did not constitute excessive use of force. In *People v. Hanna*, 223 Mich.App. 466 (1997), cert den. 528 U.S. 1131, 120 S.Ct. 970, 145 L.Ed.2d 840, the Michigan Supreme Court found no Due Process violation or unreasonable search in a situation where the police used "Do-Rite" sticks to induce a intoxicated defendant to submit to a drug draw. The sticks are two sticks joined by a short length of string, similar to nun-chucks. They were used in that case to apply force to pressure points, causing brief and temporary pain, which induced the defendant to comply with the blood draw. The court noted that the alternative of holding down the defendant may have resulted in greater harm to the defendant and the police.

Another case has received much recent attention. In *Buckley v. Haddock*, 292 Fed.Appx. 791, C.A.11 (Fla.), 2008, a 42 U.S.C. § 1983 excessive force case, a police officer had arrested a person who was intoxicated. The defendant was handcuffed, was not resisting, but refused to get up off the ground. After repeatedly and plainly warning Mr. Buckley that a Taser device would be used, to which Buckely shouted, "I don't care anymore-tase me", and after giving the defendant some time to comply, the deputy discharged the Taser. The Taser was used for approximately five seconds in the "stun gun" mode. The deputy applied the Taser's electrodes directly to Buckley's

clothed back and chest. After the deputy discharged the Taser, he asked the defendant again to stand up; but he did not comply. Again, the deputy plainly warned defendant that the Taser would be used and indeed he used the device three times before the defendant complied. The defendant testified to pain and exhibited sixteen small scars. The Court recognizes that the circumstance in *Buckley* was different, in that it was an arrest situation out on a busy highway, but the similarity was that the officer utilized the Taser to inflict pain to achieve compliance. The court there rejected the excessive force claim, and noted " The Fourth Amendment does not require officers to use the least intrusive or even less intrusive alternatives in search and seizure cases. The only test is whether what the police officers actually did was reasonable. " (quoting *Plakas v. Drinski*, 19 F.3d 1143, 1149 (7th Cir.1994)). The Supreme Court denied certiorari on May 18, 2009 *(Buckley v. Rackard*, --- S.Ct. ----, 2009 WL 273218, 77 USLW 3449, 77 USLW 3626, 77 USLW 3632 (U.S. May 18, 2009).

It must be remembered that all this came about as a result of the defendant's refusal to comply with a lawful Order. As noted above, the Court would have preferred that the police have brought the defendant before the bench upon his refusal to comply. However, the law allows the police to use reasonable force to execute a warrant for a search of a person. The defendant is not allowed to simply refuse to obey an Order of the Court. The law therefore would have permitted the officers to forcibly restrain the defendant and use their combined strength to force him to open his mouth to be swabbed. This clearly may have created greater risk and harm to the defendant and to the officers. Certainly the pain inflicted upon the defendant could have been substantial and lingering. In the alternative, the officer chose to apply the "drive stun" mode of the Taser, utilizing the milder method of application. The defendant was forewarned, steps were taken to limit his risk of injury, and the device was used one time for a brief burst. There was no lasting damage or injury.

The Court is certainly concerned that the purpose of the Taser was to inflict pain, and has seriously considered the argument of the defendant that a line is crossed when such government action is sanctioned. This Court would immediately condemn and sanction the actions of the police if there was any indication that the Taser was used maliciously, or to an excessive extent, or with resulting injury. The Court is convinced by the evidence presented that the exact opposite of those factors was present in this case. The Court would not advise the government to systematically utilize pain compliance as a standard tool in future similar circumstances, because of the intense

scrutiny the use of such tactics would receive from this Court. However, this case is perhaps best described as the "perfect storm" where the crimes being investigated were egregious, the evidence sought highly probative, the intrusion required was minimal, and with a subject who steadfastly refused to comply with a lawful court Order. Further, the officers, armed with the Order issued, repeatedly sought the subject's compliance, explored alternative methods of obtaining the sample, repeatedly warned the defendant of the consequences of his refusal and took steps to minimize the pain inflicted and the potential for injury. There was no malice or desire to injure the defendant.

The Court finds that the use of force was reasonable under the circumstances and that the swabs were lawfully obtained. The motion to suppress is denied. The People may use the evidence obtained in their case in chief at trial.

This constitutes the Decision and Order of the Court.

Hon. Sara S. Sperrazza
Niagara County Court Judge

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